IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-620

JOHN GUYTON
Petitioner,

VS.

STATE OF OHIO
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

REPLY BRIEF FOR PETITIONER

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I N D E X

TABLE OF AUTHORITIES

Cases:

Statute:

JURISDICTION

Respondent contends (Answer p.1) that "the Petitioner has failed to successfully raise a constitutional issue." I submit this contention is baseless and inaccurate. The constitutional question of whether the evidence presented was obtained as a result of an illegal search and seizure was initially raised in Petitioner's motion to suppress.[1] After the motion was overruled by the trial court, the issue was properly presented at every stage of appeal. See Pet. p. 8. In fact, the entire basis of Petitioner's appeal has been the question of the validity of search and seizure conducted by the officers involved herein. See Opinion of the Court of Appeals for Summit County, Ohio, Pet. App. A. p. 17.

Respondent also contends (Answer p. 1) that the issues raised by Petitioner "are not within the ambit of 28 U.S.C. §1257(3)." I submit this is inaccurate. 28 U.S.C. §1257(3) provides in relevant part that "(f)inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed

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1. The motion to suppress was included as Appendix D at pages 24 to 26 of the Petition for a Writ of Certiorari, (hereinafter cited as Pet.), filed with this Court on October 28, 1977. Ground number four (4), included therein at page 25, specifically refers to violations of the Constitution of the State of Ohio and the Fourth and Fourteenth Amendments to the Constitution of the United States.

by the Supreme Court. . . .(b)y writ of of certiorari,. . . .where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . . of. . . .the United States." In this case the issues presented are specially set up and claimed under the Constitution of the United States.

STATEMENT OF FACTS

Petitioner has reviewed the Statement of Facts included in Respondent's Answer and makes the following observations and corrections:

1. Respondent contends (Answer pp.4,7) that Petitioner's "vehicle was in the street, . . .(with) the engine running,. . . . (and was) in danger of being struck by on-coming cars." Petitioner has fully described the physical position and condition of his automobile at the time of this incident. See Pet. p. 4 and accompanying footnote 2 at pp. 4-5. A review of the transcript will further show that it was highly questionable that the automobile was running or was in any more danger of being struck by on-coming cars than any other vehicle parked on this quiet, lightly travelled, residential street.

2. Respondent alleges (Answer pp 4-5) that "Officer Sparks observed an empty holster on the Appellant's belt while the Appellant was still inside his car." I submit that this statement is an absolute untruth. See Tr. p. 9, where Officer Sparks stated upon cross-examination that "I didn't (see the holster)." Respondent even admits (Answer p. 5) that "Officer Burell saw something hanging on Appellant's

belt but was unable to identify it as an empty holster." The plain fact, as was confirmed by the Trial Court (Tr. p. 135), is that while Petitioner was inside his parked vehicle slumped over the wheel, neither officer was in a position to see his holster.

The whole thrust of Petitioner's above observations is to call to this Court's attention that from the very inception of this case, Respondent has attempted to either mis-state or misquote the facts, even to the extent of giving testimony at the hearing on the motion to suppress that was completely opposite to testimony given at the preliminary hearing in the Akron Municipal Court. The inaccuracies were not corrected until the officer re-stated his original preliminary hearing testimony upon cross-examination.

REASON FOR GRANTING THE WRIT

1. Respondent relies exclusively on the "emergency doctrine" exception to the warrant requirement in order to validate the search of Petitioner in his parked automobile. (Answer p.7). An analysis of the cases Respondent cites in support of this contention shows that this exception is not applicable to the case at bar.

In Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963), then Judge Burger considered a case in which a "disbarred" doctor had committed a criminal abortion which resulted in the death of a young schoolteacher. The deceased's sister had gone with her to the doctor's apartment.

She was present when the defendant doctor returned from the bedroom where the abortion had been performed and screamed: "Oh my God, I believe she's dead." The sister was able to flee the apartment over the resistance of the doctor's assistant, and then notified the police. When the police arrived at the apartment they announced themselves and after knocking on the door for ten minutes without receiving an answer, they were forced to break down the door. At this time the police thought "a dying or unconscious person" was being held within. On the basis of the emergency at hand, the autopsy report later conducted by the coroner was held admissible in evidence.

Judge Burger's opinion described "exigent circumstances" as consisting of "smoke coming out of a window or under a door, the sound of gunfire in a house, threats from inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within." Ibid. at 212. The situation existing in the case at bar does not even approach these calamities. According to the Respondent's own Statement of Facts (Answer p. 4) "the officers were dispatched to investigate a 'drunk'." When they arrived they came upon a "rather peaceful scene." Tr. p. 96. It was certainly not one of the emergency situations referred to in Wayne; since the officers did not believe a crime had been committed and did not administer any emergency aid.

In United States v. Barone, 330 F.2d 543 (2nd Cir 1964), cert. denied, 377 U.S. 1004 (1964), New York City policemen rightfully demanded entrance to an apartment after hearing loud screams eminating therefrom in the dead of night. After being admitted to the apartment, counterfeit currency was found in plain view. The evidence was held admissible as a product of an emergency search because the officers "had every reason to fear that assault or mayhem was being committed." Ibid. at 544. In contrast, here the officers testified to no such fears.

2. In the event this Court finds that the "emergency doctrine" is applicable to the search of Petitioner in his automobile, it would be necessary to reach Respondent's second contention (Answer p. 8) that (the officers) conduct forming the foundation for a 'frisk' is only required to be based on probable cause to investigate." Respondent's reliance on Terry v. Ohio, 392 U.S. 1 (1968), and Adams v. Williams, 407 U.S. 143 (1972), is unjustified since the officers did not believe Petitioner was armed and dangerous. See Pet. pp.12-13. In effect, Respondent is asking this Court to ignore its prior precedents by upholding the admission of evidence in circumstances which do not comply with any of the narrowly drawn exceptions to warrant clause.

CONCLUSION

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 1977, three copies of this Reply Brief were mailed to Carl M. Layman III, Assistant Summit County Prosecuting Attorney, 53 East Center Street, Akron, Ohio 44308. I further certify that all parties required to be served have been served.

RALPH B. MAHER